Supreme Court, U.S.
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No. 96 800

In The

Supreme Court of the United States

October Term, 1996

KOTAM ELECTRONICS, INC.,

Petitioner,

v.

JBL CONSUMER PRODUCTS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the enforcement scheme and policy considerations underlying this Nation's antitrust laws preclude the enforcement of agreements to arbitrate domestic antitrust claims under the Federal Arbitration Act.

LIST OF PARTIES

The parties to the proceedings below were Petitioner, Kotam Electronics, Inc., and Respondent, JBL Consumer Products, Inc. These are the parties now before this Court.

Petitioner Kotam Electronics, Inc. has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner Kotam Electronics, Inc., respectfully prays that a writ of certiorari issue to review the *en banc* judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in the above-entitled proceeding on August 19, 1996.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit, sitting *en banc*, is reported at 93 F. 3d 724 (11th Cir. 1986) *en banc*, and is reprinted in the appendix, pages 1-11. The judgment on rehearing is reprinted in the appendix, pages 12-13.

The prior panel opinion of the Court of Appeals for the Eleventh Circuit is reported at 59 F. 3d 1155 (11th Cir. 1995), and is reprinted in the appendix, pages 14-25.

The District Court's memorandum order affirming the Report and Recommendation of the United States Magistrate Judge and denying Respondent's motion to dismiss and to compel arbitration is unreported. It is reprinted in the appendix, pages 26-27.

The United States Magistrate Judge's unreported Report and Recommendation is reprinted in the appendix, pages 28-34.

JURISDICTION

In 1994 Petitioner filed a one-count suit in the Southern District of Florida alleging price discrimination in violation of the Robinson-Patman Act Amendments to the Clayton Act, 15 U.S.C. §13(a). This claim arose solely within the United States. On August 26, 1994, the District Court denied Respondent's motion to compel arbitration. On appeal, a divided panel of the Eleventh Circuit affirmed the nonarbitrability of the domestic antitrust claim. On rehearing *en banc*, the Eleventh Circuit unanimously held that "arbitration agreements concerning domestic antitrust claims are enforceable."

The jurisdiction of this Court to review the judgment of the Eleventh Circuit is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

9 U.S.C. §2. *Validity, irrevocability, and enforcement of agreements to arbitrate.*

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. §3. *Stay of proceedings where issue therein referable to arbitration*

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

15 U.S.C. §13(a). *Discrimination in price, services, or facilities – Price; selection of customers*

> (a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of

them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however,* That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive or monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further,* That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further,* That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

15 U.S.C. §15. *Suits by persons injured; amount of recovery*

Any person who shall be injured in his business or property by reason of anything forbidden

in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's 'ee.

15 U.S.C. §26. *Injunctive relief for private parties; exception*

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

STATEMENT OF THE CASE

This case clearly and directly presents the pure legal issue of whether domestic antitrust claims are arbitrable under the Federal Arbitration Act ("FAA"), a question that this Court expressly has left undecided since its 1985 decision of *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985). Petitioner, Kotam Electronics, Inc., is a dealer and distributor of consumer electronic products. From 1984 to 1994, Petitioner entered into annual dealer and distributor contracts with Respondent, JBL Consumer Products, Inc. Petitioner's sales activities involving Respondent's products were limited to domestic markets within the United States. Respondent sold consumer electronics products to both Petitioner and its competitors. Each distribution agreement contained the following arbitration clause:

> . . . Any controversy or claim arising out of or relating to this Agreement, or the breach or validity thereof, whether at common law or under statute, *including without limitation claims asserting violation of the antitrust laws*, shall be settled by final and binding arbitration in accordance with the Rules of Commercial Arbitration of the American Arbitration Association ("AAA") in effect at the time of the execution of this Agreement.

[Emphasis added.]

Acting in the time-honored tradition of a "private attorney general," Petitioner filed a one count antitrust action in federal court, alleging that Respondent engaged in price discrimination in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15

U.S.C. §13(a). Petitioner sought treble damages, attorneys' fees and costs and injunctive relief pursuant to Sections 4 and 15 of the Clayton Act, 15 U.S.C. §§15 and 26. Petitioner's complaint alleged that Respondent illegally and systematically discriminated in the prices at which it sold consumer electronics products to Petitioner and others. At the outset of the litigation, Respondent moved to dismiss the Complaint and to compel arbitration on the sole basis that the single count antitrust action is subject to the contractual arbitration clause.

On July 19, 1994, the presiding United States Magistrate Judge issued a Report and Recommendation which concluded that the domestic antitrust claim was nonarbitrable and, hence, that Respondent's motion should be denied. On *de novo* review, the District Court affirmed the Report and Recommendation. The Magistrate Judge concluded that *Cobb v. Lewis*, 488 F. 2d 41 (5th Cir. 1974), was binding precedent[1] that prohibited arbitration of antitrust claims. The trial court concluded that this Court's subsequent decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), and its progeny, limited *Cobb v. Lewis* only in its potential application to the much different context of antitrust claims arising in international transactions.

On appeal, the majority opinion of the original panel essentially agreed with the lower court's analysis. The sole issue addressed by the panel was whether *Cobb v.*

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[1] In *Bonner v. City of Prichard*, 661 F. 2d 1206 (11th Cir. 1981) (*en banc*), the Eleventh Circuit adopted as its own binding precedent all decisions of the Fifth Circuit decided prior to October 1, 1981.

Lewis remained "controlling precedent in this circuit in light of intervening decisions of the United States Supreme Court." 59 F. 3d at 1156. The panel based its conclusion that domestic antitrust claims remain nonarbitrable in large measure on this Court's explicit limitations on the scope of its decision in *Mitsubishi* that were expressed throughout the majority and dissenting opinions. *Id.* at 1157-58.

The panel opinion then surveyed this Court's jurisprudence subsequent to *Mitsubishi* concerning the arbitrability of other federal claims. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (age discrimination); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (Section 12 (2) of the Securities and Exchange Act of 1933); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (Section 10 (b) of the Securities and Exchange Act of 1934 and civil RICO claims). The majority opinion acknowledged that this Court has relied on *Mitsubishi* to expand the scope of federal statutory claims subject to arbitration. However, as this Court has not directly addressed the propriety of arbitrating domestic antitrust claims, the majority concluded that *Cobb* was not implicitly overruled by the inapposite precedent of this Court following *Mitsubishi*.

The Eleventh Circuit voted to rehear the case *en banc*. 69 F. 3d 1097.

The United States, concerned that arbitration of antitrust claims significantly would undermine enforcement of federal antitrust law, filed an *en banc* brief as *amicus curiae* in support of Petitioner. The United States contended that *Cobb* correctly acknowledged an inherent

conflict between domestic arbitration and the underlying purposes of the antitrust laws. The United States summarized its argument regarding the proper resolution of this tension:

> . . . The antitrust laws hold a unique position as "the Magna Carta of free enterprise." (*United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972)), since private antitrust suits are a critical part of the scheme for enforcement of those laws. Arbitration of domestic antitrust disputes will reduce the effectiveness of antitrust in a number of ways – for example, by significantly reducing discovery in meritorious cases, by creating a body of private law that allows illegal activities to escape public or governmental notice, and by blocking correction of most legal and factual errors made by the adjudicator. *Cobb* prevented these untoward results and should be affirmed [in the domestic sphere].

The Eleventh Circuit's *en banc* decision concluded that *Mitsubishi* effectively overruled *Cobb* and other precedent to the effect that domestic antitrust claims are arbitrable. The *en banc* court began its analysis by examining the effect of *Mitsubishi* on *American Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F. 2d 821, 825 (2d Cir. 1968), the case on which *Cobb* was premised. The court concluded that *Mitsubishi* expressly had rejected the "three major considerations" cited by *American Safety* and *Cobb*: (1) the important role of private litigants in enforcing the antitrust laws; (2) the complexity of the factual and legal issues; and (3) the inherent inappropriateness of the arbitration process for resolving antitrust claims. 93 F. 3d at 726. Notwithstanding this Court's express limitation of *Mitsubishi* to the international sphere, the Eleventh

Circuit concluded that there is no valid distinction between domestic and international antitrust claims that would prevent the logic of *Mitsubishi* from applying with equal persuasion to the domestic context. "While limited to the international context by its own facts, *Mitsubishi* nevertheless substantially weakened the decision in *Cobb* by dismantling all of the *American Safety* policy considerations underlying the former Fifth Circuit's holding in *Cobb*." 93 F. 3d at 726-27.

The Eleventh Circuit also read this Court's emphasis on "federal policy" considerations, in *Mitsubishi*, 93 F. 3d at 727, as an imprimatur declaring that the policies underlying the FAA necessarily outweigh the policies underlying both domestic and international antitrust issues. *Id.* Notably, however, despite this Court's careful and continued references to *international* policy considerations in *Mitsubishi*, the *en banc* court did not independently compare the competing policy considerations underlying these two federal statutes in the context of domestic antitrust claims. The Eleventh Circuit merely accepted that the policies underlying international antitrust claims are equivalent to the policies underlying domestic antitrust claims, in effect rendering superfluous this Court's discussion in *Mitsubishi* about considerations of international comity. Finally, the full court of appeals justified its result by noting it was in line with four other circuits that either have directly or indirectly expressed the view that the reasoning of *Mitsubishi* and the intervening decisions of this Court compel the conclusion that domestic antitrust claims are arbitrable. *Id.* at 727-28, *citing Nghiem v. NEC Elec., Inc.*, 25 F. 3d 1437, 1441-42 (9th Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 638 (1994); *Hough*

v. Merrill Lynch, Pierce, Fenner and Smith, Inc., 757 F.Supp. 283 (S.D.N.Y), *aff'd without op.*, 946 F. 2d 883 (2d Cir. 1991) (non-antitrust claims); *Sanjuan v. American Bd. of Psychiatry and Neurology, Inc.*, 40 F.3d 247 (7th Cir. 1994), *cert. denied*, ___ U.S. ___, 116 S.Ct. 1044 (1996) (*dicta*); *Smoky Greenhaw Cotton Co, Inc. v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 785 F. 2d 1274 (5th Cir. 1986) (*per curiam*), *cert. denied*, 482 U.S. 928 (1987) (non-antitrust claims). In effect, the *en banc* court determined that this Court implicitly resolved the question of the arbitrability of domestic antitrust claims in *Mitsubishi* and its progeny.

The significance of the *en banc* decision is that it has resolved a fundamental legal question left open by this Court's jurisprudence governing the arbitrability of federal claims. There is a growing conflict among the various courts of appeals that directly have ruled on the issue. The Fifth Circuit in *Cobb*, the Second Circuit in *American Safety* (which has not been overruled by that court), and the Eighth Circuit in *Helfenbein v. International Indus., Inc.*, 438 F. 2d 1068 (8th Cir.), *cert. denied*, 404 U.S. 872 (1971), still maintain that domestic antitrust claims are non-arbitrable. The Ninth Circuit in *Nghiem* and now the Eleventh Circuit have reached the opposite conclusion. Adding to the confusion, there is an intra-circuit conflict in the Ninth Circuit that has not been settled by *en banc* action. *Nghiem*, a panel decision, is inconsistent with two earlier cases: *Lake Communications, Inc. v. ICC Corporation*, 738 F. 2d 1473 (9th Cir. 1984), and *A&E Plastik Pak Co., Inc. v. Monsanto Co.*, 396 F. 2d 710 (9th Cir. 1968).

Thus, the courts of appeal stand sharply divided on an important issue of federal law that ought to be settled by this Court. As evidenced by the procedural history of

this case, litigants and their counsel are uncertain concerning the state of the law. As other federal courts face or re-examine this issue, and in the absence of a definitive decision from this Court, it is probable that the *en banc* decision of the Eleventh Circuit will have enhanced precedential value. Given the crucial role of private actions in the enforcement of our Nation's antitrust laws, the lack of any meaningful comparative policy analysis by the Eleventh Circuit, and this Court's consistent distinction between domestic and international antitrust claims for purposes of arbitration, the Supreme Court authoritatively should resolve this disagreement over arbitrable enforcement of an important issue of federal law and the proper interplay of competing federal policies.

REASONS FOR GRANTING THE WRIT

This case clearly and directly presents a question that this Court expressly left undecided in *Mitsubishi* – whether domestic antitrust claims are arbitrable. When *Mitsubishi* was rendered, no federal court of appeals had held that domestic antitrust disputes were arbitrable. The Court explicitly reserved the issue as to domestic antitrust claims throughout its opinion. The Court opened the opinion by stating that certiorari was granted "primarily to consider whether an American court should enforce an agreement to resolve antitrust claims by arbitration *when that agreement arises from an international transaction.*" 473 U.S. at 624 (emphasis added). Next, the Court noted the implausibility of its reasoning to dilute the *American Safety* doctrine in the domestic context:

> *We find it unnecessary to assess the legitimacy of the American Safety doctrine as applied to agreements to arbitrate arising from domestic transactions. . . .* [W]e conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.

Id. at 629 (emphasis added). This Court then emphasized that it was "weigh[ing] the concerns of *American Safety against a strong belief in the efficacy of arbitral procedures for the resolution of international commercial disputes* and an equal commitment to the enforcement of freely negotiated choice-of-forum clauses." *Id.* at 631 (emphasis added). As to the "core of the *American Safety* doctrine – the fundamental importance to American democratic capitalism of the regime of the antitrust laws," *id.* at 634, this Court expressly confined the decision to the international arena. Mr. Justice Stevens' dissent in *Mitsubishi* also reiterated the limitation of the majority opinion to international antitrust cases: "The Court assumes for the purposes of its decision that the antitrust issues would not be arbitrable if this were a purely domestic dispute . . . but holds that the international character of the controversy makes it arbitrable." *Id.* at 758 (dissenting opinion).

This Court's subsequent three cases comprising its jurisprudence regarding the arbitrability of federal claims have continued to preserve the question of the arbitrability of domestic antitrust disputes. In *Shearson/American*

Express v. McMahon, the Court reiterated that "the holding in *Mitsubishi* was limited to the international context." 482 U.S. at 239. Indeed, the *McMahon* opinion recognized that the antitrust laws have a unique position among federal statutes; the Court explained that the RICO treble damages provisions are not as important to advancing the national welfare as the comparable antitrust provisions. *See id.* at 241-42. Nothing in the other two arbitration cases *sub silentio* overruled the line of authority from the courts of appeals to the effect that domestic antitrust claims are non-arbitrable. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Rodriguez deQuijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). The Court's jurisprudence provides that the determination of arbitrability is an individualized process that depends on an analysis of the language, legislative history and underlying policies of each particular statute. The ultimate question is whether there is an " 'inherent conflict' between arbitration and the [statute's] underlying purposes." *Gilmer*, 500 U.S. at 26, *quoting McMahon*, 482 U.S. at 227.

This particularized determination must be made as the result of searching inquiry, rather than the tautological conclusion that there is no material difference between domestic and international antitrust claims. It is an extremely important issue of federal policy that this Court authoritatively should settle. The statutory scheme of the Nation's antitrust laws and their underlying policies are unparalleled. The Sherman Act is "a comprehensive charter of economic liberty" that is "as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States v.*

Topco Assoc., Inc., 405 U.S. 596, 610 (1972); *see also Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359-60 (1933) ("charter of freedom" that may be fairly compared to a constitutional provision).

A fundamental component of the implementation of the public policy of the antitrust laws is enforcement by private litigants. The Attorney General is primarily responsible for enforcement of the Sherman Act. 15 U.S.C. §4. The Attorney General and the Federal Trade Commission have authority to enforce the Robinson-Patman Act amendments to the Clayton Act. *See* 15 U.S.C. §§21, 25. There are, however, scarce governmental resources available to police and correct antitrust violations.

To encourage additional enforcement of the antitrust laws, and to deter potential violations, Congress authorized private parties who are injured by violations of the antitrust laws to sue for treble damages, costs and attorney's fees. 15 U.S.C. §15; *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 138-39 (1968). Treble damages provide a strong inducement for private parties – who are in the best position to expose violations – to pursue antitrust violations as "private attorneys general." *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 (1972). As Mr. Justice Stevens observed in *Mitsubishi*, "[t]he unique public interest in the enforcement of the antitrust laws is repeatedly reflected in the special remedial scheme enacted by Congress." 473 U.S. at 652 (dissenting opinion); *see also Mitsubishi*, 473 U.S. at 635 ("Without doubt, the private cause of action plays a central role in enforcing this regime. . . . The treble-damages provision wielded by the private litigant is a chief tool in the antitrust

enforcement scheme, posing a crucial deterrent to potential violators."). By the same token, in order to recover under the antitrust laws a private plaintiff must establish not just injury to itself, but also injury to competition. *E.g., Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977). The business community at large has a compelling interest in observable enforcement of antitrust laws and remedies intended to prevent anticompetitive practices and to "protect the public from the failure of the market." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993). The touchstone of the antitrust laws is the betterment of consumer welfare. *E.g., Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 (1984).

Unlike any other area of federal law, then, private actions pursuant to the Nation's antitrust laws are imbued with public interest and public welfare concerns. Private actions not only redress private wrongs but also vindicate the public interest in free competition – which precisely is why prevailing private plaintiffs are awarded treble damages and attorney's fees. Observable enforcement in federal court by private attorneys general is a crucial component for the implementation of the underlying purpose of the Nation's antitrust laws. Antitrust judgments (including the adverse tax consequences they impose): 1) enable prevailing plaintiffs to punish wrongdoers whose conduct has damaged competitive processes; 2) give rise to collateral estoppel which thereby enables others injured by antitrust violations to obtain redress without having to prove the violation all over again; and 3) send a powerful message that from a societal viewpoint a certain type of conduct or structure is harmful. This enforcement mechanism should not be

diluted without careful and thorough consideration of all applicable policy implications.

As this Court explicitly recognized in *Mitsubishi*, the policies and underlying purpose of the antitrust laws are not the same in the domestic and international spheres. In addition to the rationale of the *Mitsubishi* opinion, the related concepts of international comity and extraterritorial effect of the laws of this Country, *on balance*, render consensual arbitration a more palatable alternative to federal court processes and procedures. Customs and business practices of various nations are diverse. An acceptable business practice in one country may be deemed illegal in another. Many countries (other than our nation's major trading partners) have no antitrust laws. In order to avoid offending political and economic policy of other nations and in furtherance of international comity, this Court in *Mitsubishi* implicitly recognized its jurisdictional limitations and restricted enforcement power with respect to foreign entities that transact international business with American individuals and companies. Because of these unique characteristics, in the international realm, the antitrust policy goals of private enforcement and deterrence of wrongdoers properly may be subordinated.

In the domestic realm, however, the dual policy goals of vigorous private enforcement and deterrence are fundamental to the purpose of the Nation's antitrust laws. These core values underlying the operation and administration of the antitrust laws in the domestic economy must be accorded different weight and priority in the process of determining arbitrability. There are also a

number of corollary policies that are not necessarily present in the international context that must be properly considered and weighed. Some of these considerations that should be factored into the analysis include the following:

• Subjecting antitrust claims to resolution in relatively secret arbitration forums undoubtedly will remove a considerable number of cases from the public eye. The deterrent effect of observable private enforcement – including negative publicity, potential shareholder derivative actions, and possible scrutiny by law enforcement agencies – likely would be impaired. The concomitant loss of the right to trial by jury also undermines the efficacy of private actions and their deterrence value.

• Resolution of antitrust cases by arbitration may strangle growth and evolution of legal precedent. Written arbitration awards (which are not the norm), to the extent they ever are publicly known, have no precedential or persuasive effect. Nor is there any substantive appellate remedy for an erroneous award. *See* 9 U.S.C. §10. This policy ramification is particularly pernicious since the antitrust laws are akin to constitutional provisions that evolve in response to changing economic times. Depending on how widespread arbitration agreements become, antitrust precedent could become frozen. Indeed, this Court should consider how limited the present state of antitrust jurisprudence would be had arbitration clauses been enforceable as to antitrust claims, thirty or forty years ago.

• There is a very real concern whether an arbitration award can impose any effective injunctive relief, so

as to prevent violators from continuing to cause adverse competitive impact beyond the confines of the specific dispute subjected to arbitration.

• Discovery in arbitration proceedings is sharply circumscribed. It is even more limited with respect to non-parties. Effective enforcement of whatever discovery rights are afforded in arbitration proceedings is difficult. Yet broad discovery that is reliably enforced may make the difference between antitrust claimants' winning or losing. There is seldom "smoking gun" evidence of antitrust violations. Circumstantial evidence is the usual mode of proof in antitrust cases. Further, as this Court has noted, time and again, antitrust plaintiffs generally must prove a broad, adverse impact on competitive processes themselves, not merely harm to a competitor. Without adequate discovery, an antitrust claimant's chances of prevailing diminish proportionately.

• The relationship between contracts of adhesion and antitrust violations further militates against allowing arbitration of antitrust claims. Antitrust claims often arise in the context of significant market power wielded by the defendant – market power sufficient to force businesses to accede to the imposition of arbitration clauses. In such instances, proof that the arbitration clause was a contract of adhesion, so as to circumvent the effects of the clause, would, in effect, require proof of the antitrust violation, itself.

These and other policies underlying the purposes of this Nation's antitrust laws must be explored in depth and balanced appropriately against the competing values embodied in the FAA. The only two circuit courts of

appeals that have ruled that domestic antitrust claims are arbitrable have not performed such a comparative policy analysis. Both the Eleventh Circuit in this case and a panel of the Ninth Circuit in *Nghiem* jumped to the conclusion that the policies underlying domestic and international antitrust disputes are indistinguishable. Both courts proceeded to extrapolate this Court's reasoning in *Mitsubishi* to apply perforce to domestic antitrust cases, thereby begging the question. *See* 93 F. 3d at 728 ("In light of *Mitsubishi* and its progeny, as well as the persuasive authority from our sister circuits, we hold that . . . arbitration agreements concerning domestic antitrust claims are enforceable."); *Nghiem*, 25 F. 3d at 1441-42 ("Although *Mitsubishi* found 'it unnecessary to assess the legitimacy of the *American Safety* doctrine as applied to agreements to arbitrate arising from domestic transactions' [citation], we are persuaded that the decision is not restricted to the international context. . . . We hold that *Mitsubishi* effectively overruled *American Safety* and its progeny . . . "). These decisions are not faithful to the comparative analytical process that must be employed to determine the arbitrability of federal claims, in general, and domestic antitrust claims, in particular. It is incumbent on this Court to settle this issue directly and with finality.

The Eleventh Circuit's *en banc* decision resolved a significant issue of federal law that this Court expressly reserved or left undecided in *Mitsubishi*. There is real conflict and confusion among the various circuits regarding the scope and effect of *Mitsubishi*. As illustrated by the procedural history of this case, this state of legal flux has bred uncertainty concerning the proper forum for antitrust claims. There is a compelling need for this Court

to resolve this nagging open question and this case provides an excellent vehicle for its resolution.

The exact question this Court left undecided 11 years ago in *Mitsubishi* has wound its way through the federal court system in this case as a threshold legal issue. The single count antitrust complaint in the case at bar, squarely presents the issue without complication or diffusion. Indeed, the *en banc* court below noted that Petitioner's "single claim for price discrimination falls squarely within the terms of the parties' agreement to arbitrate 'claims asserting violation of the antitrust laws.' " 93 F. 3d at 725, n.2. The *en banc* decision and judgment is final in the absence of review by this Court. As a result, this issue of federal law, which involves the collision between fundamental antitrust values and FAA policies, is directly and cleanly presented. For the policy reasons set forth above, it is appropriate to grant the petition for certiorari.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

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November 18, 1996

KOTAM ELECTRONICS, INC.,
Plaintiff-Appellee,

v.

JBL CONSUMER PRODUCTS, INC., Defendant-Appellant.

No. 94-4984.

United States Court of Appeals,
Eleventh Circuit.

Aug. 19, 1996.

David L. Ross Greenberg, Traurig, Miami, FL, Robert H. Rawson, Jr., Stephen J. Squeri, Cleveland, OH, for Appellant.

Stephen Nagin, Miami, FL, for Appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before TJOFLAT, Chief Judge, KRAVITCH, HATCHETT, ANDERSON, EDMONDSON, COX, BIRCH, DUBINA, BLACK, CARNES and BARKETT, Circuit Judges.

DUBINA, Circuit Judge:

We voted to rehear this case *en banc* to determine whether the holding in *Cobb v. Lewis*, 488 F.2d 41 (5th Cir.1974),[1] that antitrust claims are non-arbitrable,

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[1] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

remains controlling precedent in this circuit in light of intervening decisions of the United States Supreme Court. In 1985, the Supreme Court made clear that antitrust disputes in the international context are arbitrable. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985). Today we hold that antitrust disputes in the domestic context are arbitrable as well.

I. BACKGROUND

Plaintiff-Appellee Kotam Electronics, Inc. ("Kotam") sells and distributes consumer electronic products. From approximately 1984 to 1992, Kotam entered into annual dealer and distributor contracts with Defendant-Appellant JBL Consumer Products, Inc. ("JBL"). Each of these contracts contained the following arbitration clause explicitly requiring the parties to submit antitrust claims to binding arbitration:

> 22. GOVERNING LAW AND ARBITRATION
>
> b. Any controversy or claim arising out of or relating to this Agreement, or the breach or validity thereof, whether at common law or under statute, *including without limitation claims asserting violation of the antitrust laws, shall be settled by final and binding arbitration* in accordance with the Rules for Commercial Arbitration of the American Arbitration Association ("AAA") in effect at the time of the execution of this Agreement.

(emphasis added).

In 1994, despite its agreement to arbitrate, Kotam filed suit in federal district court against JBL alleging price discrimination in violation of the Robinson-Patman Act, 15 U.S.C. § 13(a).[2] In response, JBL moved to dismiss the complaint or, in the alternative, to stay the judicial proceedings pending arbitration pursuant to section 3 of the Federal Arbitration Act (FAA), 9 U.S.C. § 3. The district court, relying on *Cobb v. Lewis*, 488 F.2d 41 (5th Cir.1974), denied JBL's motion.

JBL appealed, and a divided panel of this court affirmed the district court's judgment. *See Kotam Elecs., Inc. v. JBL Consumer Products, Inc.*, 59 F.3d 1155 (11th Cir.1995) (Gibson, J., dissenting). A majority of the judges of this court in regular active service voted to rehear the case *en banc*, *see Kotam Elecs., Inc. v. JBL Consumer Products, Inc.*, 69 F.3d 1097 (11th Cir.1995),[3] and we now reverse the judgment of the district court.

II. JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction over this appeal pursuant to section 16 of the FAA, which provides that "[a]n appeal may be taken from an order refusing a stay of any action under section 3 [of the FAA]." 9 U.S.C. § 16(a)(1)(A). The

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[2] There is no dispute that Kotam's single claim for price discrimination falls squarely within the terms of the parties' agreement to arbitrate "claims asserting violation of the antitrust laws."

[3] This order vacated the panel's opinion. *See* 11th Cir.R. 35-11 ("Unless otherwise expressly provided, the effect of granting a rehearing *en banc* is to vacate the panel opinion and to stay the mandate.").

district court denied JBL's motion to stay judicial proceedings pending arbitration based on its resolution of a question of law. Therefore, we review the district court's decision *de novo*. *See Luckie v. Smith Barney, Harris Upham & Co., Inc.*, 999 F.2d 509, 512 (11th Cir.1993).

III. DISCUSSION

Kotam argues that the district court correctly held that *Cobb* remains controlling precedent in the Eleventh Circuit. In contrast, JBL argues that in light of intervening decisions of the Supreme Court, specifically *Mitsubishi* and its progeny, *Cobb*'s holding that antitrust claims are non-arbitrable can no longer be considered controlling precedent in this circuit. We agree with JBL.

A. *Cobb v. Lewis*

In 1974, the former Fifth Circuit held that, "as a general matter, antitrust claims are not appropriate subjects of arbitration." *See Cobb*, 488 F.2d at 47. *Cobb* involved an agreement between the franchiser of a nationwide chain of motion picture theaters and the owners of individual theaters. *Id.* at 43. The individual theater owners filed a class action alleging, among other things, violations of the Sherman Act, 15 U.S.C. § 1, and the Clayton Act, 15 U.S.C. § 14. *Id.* at 43-44. In concluding that antitrust claims are not appropriate subjects of arbitration, the Cobb court followed the lead of the Second, Eighth, and Ninth Circuits. *See Cobb*, 488 F.2d at 47, *relying on American Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 825 (2nd Cir.1968); *Helfenbein v. International Indus. Inc.*, 438 F.2d 1068 (8th Cir.), *cert. denied*, 404

U.S. 872, 92 S.Ct. 63, 30 L.Ed.2d 115 (1971); *A & E Plastik Pak Co. v. Monsanto Co.*, 396 F.2d 710 (9th Cir.1968).

Specifically, the *Cobb* panel expressly premised its holding on "three major considerations" outlined by the Second Circuit in *American Safety:* (1) the important role of private litigants in enforcing the antitrust laws; (2) "the complexity of the issues and the extensiveness and diversity of the evidence antitrust cases usually involve;" and (3) "the questionable propriety of entrusting the decision of antitrust issues to commercial arbitrators, who 'are frequently men drawn for their business expertise,' when 'it is the business community generally that is regulated by the antitrust laws.' " *Cobb*, 488 F.2d at 47 (citing *American Safety*, 391 F.2d at 826-27).[4]

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[4] The *American Safety* court also relied on two other considerations not cited by the *Cobb* court: (1) that arbitration clauses might be contracts of adhesion; and (2) that the claim in *American Safety* was "that the *agreement itself* was an instrument of illegality." 391 F.2d at 827. (emphasis added). In *Mitsubishi*, the Supreme Court rejected the first consideration, noting that "[t]he mere appearance of an antitrust dispute does not alone warrant invalidation of the selected forum on the undemonstrated assumption that the arbitration clause is tainted." *Mitsubishi*, 473 U.S. at 632, 105 S.Ct. at 3357. While the second rationale has not been called into question, it was not relied upon by the *Cobb* court and does not apply under the facts of this case.

B. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*

In 1985, the Supreme Court explicitly rejected the *American Safety* doctrine and each of the underlying considerations upon which the *Cobb* court relied. *See Mitsubishi*, 473 U.S. 614, 105 S.Ct. 3346. In *Mitsubishi*, the parties entered into a sales agreement containing an arbitration clause. The clause provided for arbitration of all controversies arising out of the agreement in accordance with the rules of the Japan Commercial Arbitration Association. *Id.*, 473 U.S. at 617, 105 S.Ct. at 3349. When disputes arose among the parties, Soler resisted the arbitration of its antitrust claims on the basis of the *American Safety* doctrine. *Id.*, 473 U.S. at 620-23, 105 S.Ct. at 3350-52. However, the Supreme Court explicitly rejected the *American Safety* considerations and held that, in the international context, antitrust claims are arbitrable.

First, the Court concluded that "[t]he importance of the private damages remedy . . . does not compel the conclusion that it may not be sought outside an American court." *Mitsubishi*, 473 U.S. at 635, 105 S.Ct. at 3358. The *Mitsubishi* Court reasoned that arbitrators are bound, as are judges, to apply the antitrust laws, and that there is no basis for assuming that arbitration will not provide an adequate mechanism for enforcement of the antitrust laws. *Id.*, 473 U.S. at 635-37, 105 S.Ct. at 3358-60. Second, the Court dismissed the consideration that antitrust suits are "prone to complications" and are therefore ill-suited for arbitration. *Id.*, 473 U.S. at 633, 105 S.Ct. at 3357. The

Court emphasized that adaptability and access to expertise are hallmarks of arbitration and noted that the "anticipated subject matter of the dispute may be taken into account when the arbitrators are appointed." *Id.*, Third, the Court declined to assume that arbitration panels will be hostile to the constraints on business conduct that antitrust law imposes. As the Court stated, "We decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators." *Id.*, 473 U.S. at 634, 105 S.Ct. at 3358.

It is true, as Kotam points out, that the *Mitsubishi* Court noted at the outset of its opinion that it found it "unnecessary to assess the legitimacy of the *American Safety* doctrine as applied to agreements to arbitrate arising from domestic transactions." 473 U.S. at 629, 105 S.Ct. at 3355; *see id.* ("we conclude that concerns of international comity . . . require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context"). However, we do not think that this language decides the issue currently pending before this court. While limited to the international context by its own facts, *Mitsubishi* nevertheless substantially weakened the decision in *Cobb* by dismantling all of the *American Safety* policy considerations underlying the former Fifth Circuit's holding in *Cobb*.

The *American Safety* doctrine, and consequently *Cobb*, is further undermined by *Mitsubishi's* emphasis on the "federal policy favoring arbitration." As the Supreme Court explained, " 'the preeminent concern of Congress in passing the [FAA] was to enforce private agreements into which parties had entered,' a concern which

'requires that we rigorously enforce agreements to arbitrate.' " *Mitsubishi*, 473 U.S. at 625-26, 105 S.Ct. at 3353 (citing *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221, 105 S.Ct. 1238, 1242, 84 L.Ed.2d 158 (1985)). Moreover, the *Mitsubishi* Court stated that a party, having agreed to arbitrate, should be held to that agreement unless Congress has "evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Mitsubishi*, 473 U.S. at 628, 105 S.Ct. at 3354-55. Finally, the *Mitsubishi* Court could find no evidence of Congressional intention to preclude arbitration of antitrust claims in the text or legislative history of either the Sherman Act or the FAA. *See id.*, 473 U.S. at 628-29, 105 S.Ct. at 3355. Thus, we conclude that JBL is correct in its contention that the decision in *Mitsubishi* casts considerable doubt on the viability of *Cobb* in this circuit.

C. *Mitsubishi's Progeny.*

The Supreme Court itself has acknowledged that its rejection of the *American Safety* considerations in *Mitsubishi* has application outside the international context. Two years after the *Mitsubishi* decision, the Supreme Court rendered its decision in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987) (hereinafter "*McMahon*"). In *McMahon*, the Supreme Court again rejected the *American Safety* considerations; however, it also discarded the distinction between domestic and international transactions with respect to arbitration of § 10(b) of the Securities Exchange Act of 1934, and civil RICO claims. Most notably, the Supreme Court rejected the Second Circuit's holding that the *American Safety* doctrine was still good law, despite

Mitsubishi, on the ground that *Mitsubishi* pertained only to *international* transactions. *Id.*, 482 U.S. at 238-42, 107 S.Ct. at 2344-46. The Supreme Court concluded that "[a]lthough the holding in *Mitsubishi* was limited to the international context, much of its reasoning is equally applicable [to domestic civil RICO claims]." *McMahon*, 482 U.S. at 239, 107 S.Ct. at 2344; *see also id.* 482 U.S. at 232, 107 S.Ct. at 2341 (declining to limit its earlier decision in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974), which involved the arbitrability of § 10(b) claims, to cases arising in an international setting).[5]

Furthermore, the Supreme Court has since cited *Mitsubishi* for the general proposition that antitrust claims are arbitrable. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28, 111 S.Ct. 1647, 1652, 114 L.Ed.2d 26 (1991) ("claims under [the Sherman Act] are appropriate for

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[5] In *McMahon*, the Supreme Court also revisited an earlier case, *Wilko v. Swan*, 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed. 168 (1953), and that Court's concerns about arbitration. The *McMahon* Court noted that *Wilko* stood for the proposition that arbitration would "weaken [a plaintiffs'] ability to recover" under the securities laws, and that the arbitration agreement in that case was unenforceable "only because arbitration was judged inadequate to enforce the statutory rights created by § 12(2) [of the Securities Act, 15 U.S.C. § 77*l*(2)]." *McMahon*, 482 U.S. at 228-31, 107 S.Ct. at 2338-40. Questioning that reasoning, the Court stated "[i]t is difficult to reconcile *Wilko's* mistrust of the arbitral process with this Court's subsequent decisions involving the Arbitration Act." *McMahon*, 482 U.S. at 231-32, 107 S.Ct. at 2340 (citing *Mitsubishi*). Ultimately, the Court overruled *Wilko* in *Rodriguez de Quijas v. Shearson/American Express Inc.*, 490 U.S. 477, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989), relying largely on *McMahon* and *Mitsubishi*.

arbitration"). *See also Matsushita Elec. Indus. Co. v. Epstein*, ___ U.S. ___, ___, 116 S.Ct. 873, 883, 134 L.Ed.2d 6 (1996) ("As [*McMahon*] demonstrates, a statute conferring exclusive federal jurisdiction for a certain class of claims does not necessarily require resolution of those claims in federal court.").

D. *Other Circuits' Treatment Of This Issue.*

Finally, we find it persuasive that since the Supreme Court's ruling in *Mitsubishi*, four other circuits have expressed the view that the *American Safety* doctrine is incompatible with the Supreme Court's intervening decisions and that domestic antitrust claims are therefore arbitrable. The Ninth Circuit found that:

> Given the Court's meticulous step-by-step disembowelment of the *American Safety* doctrine, this circuit will no longer follow *American Safety*. We hold that *Mitsubishi* effectively overruled *American Safety* and its progeny.

Nghiem v. NEC Elec., Inc., 25 F.3d 1437, 1441-42 (9th Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 638, 130 L.Ed.2d 544 (1994) (citations omitted). Likewise, the Second Circuit affirmed, without opinion, a district court's holding that "the reasoning of *Mitsubishi* should apply with equal force to domestic claims" and that " 'none of the justifications for the *American Safety* doctrine retain their vigor.' " *Hough v. Merrill Lynch*, 757 F.Supp. 283, 286 (S.D.N.Y.), *aff'd without op.*, 946 F.2d 883 (2d Cir.1991) (citations omitted).

The Seventh Circuit, while not explicitly deciding the issue, has stated in dicta that companies "may agree to

arbitrate their antitrust disputes – certainly so for international transactions, . . . and likely so for domestic transactions." *Sanjuan v. American Bd. of Psychiatry and Neurology, Inc.*, 40 F.3d 247, 250 (7th Cir.1994), *cert. denied*, ___ U.S. ___, 116 S.Ct. 1044, 134 L.Ed.2d 191 (1996); *see also Smoky Greenhaw Cotton Co., Inc. v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 785 F.2d 1274, 1282 (5th Cir.1986) (per curiam, on petition for rehearing and suggestion for rehearing *en banc*), *cert. denied*, 482 U.S. 928, 107 S.Ct. 3211, 96 L.Ed.2d 698 (1987) (stating, though not in an antitrust context, that "although *Mitsubishi* arose in an international antitrust dispute and its holding purports to be limited to that context, we believe that its broad language may carry significance for domestic disputes as well").

IV. CONCLUSION

In light of *Mitsubishi* and its progeny, as well as the persuasive authority from our sister circuits, we hold that *Cobb* is no longer controlling precedent in this circuit and that arbitration agreements concerning domestic antitrust claims are enforceable. Accordingly, we reverse the district court's judgment denying JBL's motion to stay judicial proceedings pending arbitration and remand this case for further proceedings consistent with this opinion.

REVERSED and REMANDED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-4984

D. C. Docket No. 94-779-CIV

KOTAM ELECTRONICS, INC.,

Plaintiff-Appellee,

versus

JBL CONSUMER PRODUCTS, INC.,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(Filed Aug. 19, 1996)

Before TJOFLAT, Chief Judge, KRAVITCH, HATCHETT, ANDERSON, EDMONDSON, COX, BIRCH, DUBINA, BLACK, CARNES and BARKETT, Circuit Judges.

JUDGMENT ON REHEARING

AND SUGGESTION OF REHEARING EN BANC

This cause came to be heard on defendant-appellant's petition for rehearing, and was argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby REVERSED; and that this cause be and the same is hereby REMANDED to said District Court for further proceedings in accordance with the opinion of this Court;

It is further ordered that plaintiff-appellee pay defendant-appellant the costs on appeal to be taxed by the Clerk of this Court.

Entered: August 19, 1996
For the Court: Miguel J. Cortez, Clerk

By: /s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: 10/21/96

KOTAM ELECTRONICS, INC., Plaintiff-Appellee,

v.

JBL CONSUMER PRODUCTS, INC., Defendant-Appellant.

No. 94-4984.

United States Court of Appeals, Eleventh Circuit.

July 28, 1995.

David L. Ross, Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A., Miami, FL, Robert H. Rawson, Jr., Stephen J. Squeri, Cleveland, OH, for appellant.

Stephen Nagin, Herzfeld & Rubin, Miami, FL, for appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before HATCHETT and EDMONDSON, Circuit Judges, and JOHN R. GIBSON*, Senior Circuit Judge.

HATCHETT, Circuit Judge:

In this appeal, the sole issue we address is whether the holding in *Cobb v. Lewis*, 488 F.2d 41 (5th Cir.1974), that antitrust claims are non-arbitrable, remains controlling precedent in this circuit in light of intervening decisions of the United States Supreme Court. We affirm the district court's ruling that *Cobb* controls.

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* Honorable John R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

BACKGROUND

From 1984 to 1992, Kotam Electronics, Inc. (Kotam), a dealer and distributor of consumer electronics products, entered into annual dealer and distributor contracts with JBL Consumer Products, Inc. (JBL). These contracts contained identical provisions requiring the parties to submit claims asserting violations of the antitrust laws to binding arbitration.[1] Despite the arbitration provisions, Kotam brought this antitrust action alleging that JBL engaged in price discrimination against Kotam and other dealers and distributors in violation of the Robinson-Patman Act, 15 U.S.C. § 13.[2] JBL moved to dismiss the complaint or, in the alternative, to stay judicial proceedings pending arbitration pursuant to section 3 of the Federal Arbitration Act (FAA), 9 U.S.C. § 3.

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[1] The provisions provide, in relevant part:

22. GOVERNING LAW AND ARBITRATION

b. Any controversy or claim arising out of or relating to this Agreement, or the breach or validity thereof, whether at common law or under statute, including without limitation claims asserting violation of the antitrust laws, shall be settled by final and binding arbitration in accordance with the Rules for Commercial Arbitration of the American Arbitration Association ("AAA") in effect at the time of the execution of this Agreement. Judgment upon the award rendered by the Arbitrator may be entered in any court having jurisdiction thereof.

[2] The district court adopted the magistrate judge's finding that "Kotam does not deny that the claims at issue arose out of the Dealer and Distributor Agreements." Kotam does not challenge this finding on appeal.

The magistrate judge issued a report recommending that the district court deny JBL's motion. The magistrate judge found that *Cobb v. Lewis*, 488 F.2d 41 (5th Cir.1974), which held that antitrust claims are non-arbitrable, constituted binding precedent on this issue. In so doing, the magistrate judge rejected JBL's contention that the Supreme Court has effectively overruled *Cobb*, thus rendering Kotam's antitrust claims arbitrable. The district court adopted the magistrate judge's report and recommendation. This appeal followed.

DISCUSSION

We have jurisdiction pursuant to section 16 of the FAA, which provides that "[a]n appeal may be taken from an order refusing a stay of any action under section 3 [of the FAA]." 9 U.S.C. § 16(a)(1)(A). The district court's denial of JBL's motion to stay judicial proceedings pending arbitration involved only a question of law. Therefore, we review the district court's decision *de novo*. *See Luckie v. Smith Barney, Harris Upham & Co., Inc.*, 999 F.2d 509, 512 (11th Cir.1993).

In *Cobb*, the former Fifth Circuit "addressed [the] question[ ] of the appropriateness of arbitration of issues arising under the federal antitrust laws." *Cobb*, 488 F.2d at 47. The Fifth Circuit concluded that "as a general matter, antitrust claims are not appropriate subjects of arbitration." *Cobb*, 488 F.2d at 47.[3] In reaching this holding, the

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[3] The court in Cobb recognized "an 'exception' to this 'rule' against arbitration of antitrust issues for situations 'when the agreement to arbitrate is made *after* the dispute arises.' " *Cobb*,

Cobb court followed the reasoning of the Second Circuit's opinion in *American Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (2d Cir.1968):

> The *American Safety Equipment Corp.* case outlined three major considerations supporting this rule. The first is the broad range of public interests affected by private antitrust claims. The Court recognized that "[a] claim under the antitrust laws is not merely a private matter", because private antitrust actions are an integral part of the effort of the antitrust laws "to promote the national interest in a competitive economy". 391 F.2d at 826. The Second Circuit noted that it is doubtful Congress could have "intended such claims to be resolved elsewhere than in the courts". *Id.* at 827. The second is the complexity of the issues and the extensiveness and diversity of the evidence antitrust cases usually involve. These render antitrust claims "far better suited to judicial than to arbitration procedures". *Id.* The third is the questionable propriety of entrusting the decision of antitrust issues to commercial arbitrators, who "are frequently men drawn for their business expertise", when "it is the business community generally that is regulated by the antitrust laws". *Id.* at 827.
>
> We are persuaded by these considerations.

Cobb, 488 F.2d at 47 (alteration in original).

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488 F.2d at 47 (quoting *Cobb v. Network Cinema Corp.*, 339 F.Supp. 95, 99 (N.D.Ga.1972)). This exception has no application to this case.

In *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1207 (11th Cir.1981) (*en banc*), this court adopted as binding precedent all decisions of the former Fifth Circuit rendered prior to October 1, 1981. This court also adopted the rule "that a prior decision of the circuit (panel or en banc) could not be overruled by a panel but only by the court sitting en banc." *Bonner*, 661 F.2d at 1209; *see also United States v. Machado*, 804 F.2d 1537, 1543 (11th Cir.1986) ("Only a decision by this court sitting en banc or by the United States Supreme Court can overrule a prior panel decision."). The Supreme Court has not expressly overruled *Cobb*, and neither has an *en banc* court of this circuit.

"At the same time, however, according to both Eleventh and Fifth Circuit precedent this panel may not overlook decisions by the Supreme Court which implicitly overrule a binding circuit decision, or undercut its rationale." *Leach v. Pan American World Airways*, 842 F.2d 285, 286 (11th Cir.1988). JBL contends that the Supreme Court has substantially undercut the rationale of *Cobb* in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985) and its progeny. Thus, JBL argues that this panel has the authority to hold that *Cobb* is no longer viable and that Kotam's antitrust claim is arbitrable. We first address the *Mitsubishi* decision.

In *Mitsubishi*, Mitsubishi Motors Corporation (Mitsubishi), Soler Chrysler-Plymouth, Inc. (Soler), and Chrysler International, S.A. (CISA) were parties to a sales agreement containing a clause providing for arbitration for all controversies arising out of the agreement in accordance with the rules of the Japan Commercial Arbitration

Association. *Mitsubishi*, 473 U.S. at 616-17, 105 S.Ct. at 3348-49. After disputes arose among the parties, Mitsubishi brought an action in federal court, in part under the FAA, 9 U.S.C. § 1 *et seq.*, seeking to compel arbitration. *Mitsubishi*, 473 U.S. at 617-19, 105 S.Ct. at 3349-50. Soler counterclaimed against Mitsubishi and CISA, asserting, in part, claims under the Sherman Act, 15 U.S.C. § 1 *et seq.* Soler resisted the arbitration of its antitrust claims. *Mitsubishi*, 473 U.S. at 619-21, 105 S.Ct. at 3350-51. The Supreme Court held that Soler's antitrust claims were arbitrable. *Mitsubishi*, 473 U.S. at 629, 640, 105 S.Ct. at 3355, 3360-61.

In its analysis, the Supreme Court rejected the *American Safety* considerations endorsed in *Cobb*. *See Mitsubishi*, 473 U.S. at 637, 105 S.Ct. at 3359 ("[S]o long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."); at 633-34, 105 S.Ct. at 3357 ("[T]he factor of potential complexity alone does not persuade us that an arbitral tribunal could not properly handle an antitrust matter."); and at 634, 105 S.Ct. at 3357. ("[W]e also reject the proposition that an arbitration panel will pose too great a danger of innate hostility to the constraints on business conduct that antitrust law imposes."). Therefore, JBL asserts that *Mitsubishi* has undercut the rationale of Cobb to the extent that *Cobb* no longer constitutes binding precedent on this panel.

Contrary to JBL's assertions, we do not believe that *Mitsubishi* has undermined Cobb. In *Mitsubishi*, the Court stated that it "granted certiorari primarily to consider whether an American court should enforce an agreement

to resolve antitrust claims by arbitration *when that agreement arises from an international transaction.*" *Mitsubishi*, 473 U.S. at 624, 105 S.Ct. at 3352 (emphasis added). Moreover, in deciding this issue, the Court stated that:

> *We find it unnecessary to assess the legitimacy of the American Safety doctrine as applied to agreements to arbitrate arising from domestic transactions. . . .* [W]e conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the needs of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, *even assuming that a contrary result would be forthcoming in a domestic context.*

Mitsubishi, 473 U.S. at 629, 105 S.Ct. at 3355 (emphasis added).[4] In fact, the Court stated in introducing its application of the *American Safety* doctrine that "we must weigh the concerns of American Safety against a strong belief in the efficacy of arbitral procedures for the resolution of international commercial disputes and an equal commitment to the enforcement of freely negotiated choice-of-forum clauses." *Mitsubishi*, 473 U.S. at 631, 105 S.Ct. at 3356. The Court thus expressed its skepticism with *American Safety* when applying that doctrine only to the international commercial realm. *See Mitsubishi*, 473 U.S. at 631-37, 105 S.Ct. at 3356-59; *see also Mitsubishi* at 658, 105 S.Ct. at 3370 ("The Court assumes for the purposes of its decision that the antitrust issues would not be arbitrable if this were a purely domestic dispute . . . but

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[4] JBL does not dispute that Kotam's lawsuit is a domestic antitrust action.

holds that the international character of the controversy makes it arbitrable.") (Stevens, J., dissenting). Consequently, we conclude that *Mitsubishi* has not undercut the rationale of *American Safety* and *Cobb* as applied to domestic antitrust actions. Thus, *Cobb* remains the law of this circuit, and we are bound to apply it.

None of the cases the Supreme Court has decided subsequent to *Mitsubishi* compel us to change this conclusion. No question exists that the Court has relied on *Mitsubishi* to expand the scope of statutory claims subject to arbitration. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991) (Age Discrimination in Employment Act of 1967); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989) (section 12(2) of the Securities and Exchange Act of 1933); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987) (section 10(b) of the Securities and Exchange Act of 1934 and the civil provisions of the Racketeer Influenced and Corrupt Organizations Act). In none of these cases, however, did the Court speak directly to the propriety of arbitrating domestic antitrust claims. Accordingly, they do not change our view that *Cobb* remains controlling precedent in this circuit.

JBL's reliance on *Nghiem v. NEC Electronic, Inc.*, 25 F.3d 1437 (9th Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 638, 130 L.Ed.2d 544 (1994) does not persuade us to change our position either. In *Nghiem*, a panel of the Ninth Circuit, subject to a similar "prior panel rule" as this court, relied on *Mitsubishi* to overrule *Lake Communications, Inc. v. ICC Corp.*, 738 F.2d 1473 (9th Cir.1984), a decision that endorsed the *American Safety* reasoning and holding. The

Nghiem court provided three reasons to support its holding. First, the court noted that in *Gilmer* "the Supreme Court . . . cited *Mitsubishi* for the general proposition that antitrust claims can be arbitrated." *Nghiem*, 25 F.3d at 1441. Second, the court stated that "Mitsubishi . . . specifically refuted the analysis of *American Safety*." *Nghiem*, 25 F.3d at 1441. Third, the court indicated that "*Mitsubishi* may be seen as evidence of the Supreme Court's desire to make statutory rights subject to arbitration." *Nghiem*, 25 F.3d at 1442. Our analysis has already revealed that we disagree with the Ninth Circuit's second and third reasons in support of its outcome in *Nghiem*. With regard to the first reason, we believe that the best source for deciding what *Mitsubishi* held is the *Mitsubishi* decision itself, and not a phrase in a subsequent case summarizing (imprecisely, we believe) the *Mitsubishi* holding. *See Gilmer*, 500 U.S. at 26, 111 S.Ct. at 1652, 114 L.Ed.2d at 37. In any event, given the precise issue in this case, JBL's reliance on authority outside of the Supreme Court or this circuit is misplaced.

Finally, *Mitsubishi* and the cases mentioned above have placed "[t]he burden . . . on the party opposing arbitration . . . to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." *McMahon*, 482 U.S. at 227, 107 S.Ct. at 2337-38; *see also Gilmer*, 500 U.S. at 26, 111 S.Ct. at 1652, 114 L.Ed.2d at 37; *Rodriguez de Quijas*, 490 U.S. at 483, 109 S.Ct. at 1921; *Mitsubishi*, 473 U.S. at 628, 105 S.Ct. at 3354-55. We believe that Kotam has met this burden. "If such a[ ] [congressional] intention exists, it will be discoverable in the text of the [statute], its legislative history, or

an 'inherent conflict' between arbitration and the [statute's] underlying purposes." *Gilmer*, 500 U.S. at 26, 111 S.Ct. at 1652, 114 L.Ed.2d at 37 (quoting *McMahon*, 482 U.S. at 227, 107 S.Ct. at 2337-38). As outlined above, the *Cobb* court held that an inherent conflict exists between arbitration and the underlying purposes of the antitrust laws. *See Cobb*, 488 F.2d at 47 ("We agree that 'the pervasive public interest in enforcement of the antitrust laws, and the nature of the claims that arise in such cases, combine to make the outcome [that antitrust claims are non-arbitrable] clear'[.]") (quoting *American Safety*, 391 F.2d at 828). *Cobb* constitutes binding precedent on this panel. Therefore, because Kotam invoked Cobb in opposing JBL's motion, Kotam has met its burden under *Mitsubishi* and its progeny.

CONCLUSION

In sum, we hold that the district court properly relied on *Cobb* in denying JBL's motion to stay judicial proceedings pending arbitration. Accordingly, we affirm the judgment of the district court.

AFFIRMED.

JOHN R. GIBSON, Senior Circuit Judge, dissenting:

The court today holds that *Cobb v. Lewis*, 488 F.2d 41 (5th Cir.1974), is controlling circuit precedent and rejects the argument that *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985), is intervening authority justifying this panel's departure from *Cobb*. I respectfully dissent.

Mitsubishi makes plain that it deals only with arbitration of antitrust cases in an international setting and, on several occasions, disavows that it applies to domestic transactions. 473 U.S. at 629, 105 S.Ct. at 3355. Nevertheless, *Mitsubishi* devotes nearly four pages to analyzing *American Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (2d Cir.1968). The Court considers and rejects the four ingredients supporting *American Safety's* conclusion that antitrust cases may not be arbitrated. Only one of the four ingredients in *American Safety*, the proposition that an arbitration panel will threaten business conduct because of innate hostility to antitrust law, reflects any difference between a domestic and international case. In turn, *Cobb* is based on *American Safety*. Although a few other cases are referred to in *Cobb*, *American Safety* is the first and foremost authority discussed.

I conclude that *Mitsubishi* deals a death blow to *Cobb*. *Mitsubishi* either overruled *Cobb*, or at least, destroyed circuit authority refusing to enforce arbitration agreements in domestic antitrust disputes.

Thus, I believe that the circuit operates on a clean slate, and that it would be wise to directly consider the issue. If we did so, I would conclude, like the Ninth Circuit and several other district courts, that agreements to arbitrate domestic antitrust disputes are enforceable. *Nghiem v. NEC Elec., Inc.*, 25 F.3d 1437 (9th Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 638, 130 L.Ed.2d 544 (1994); *see also Sanjuan v. American Bd. of Psychiatry and Neurology, Inc.*, 40 F.3d 247, 250 (7th Cir.1994).

I would reverse the district court's order and direct the district court to enter a stay to allow arbitration of the antitrust claims.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 94-0779-CIV-MORENO

KOTAM ELECTRONICS, INC.,
d/b/a SOUND INFINITY CENTER,

Plaintiff,

vs.

JBL CONSUMER PRODUCTS, INC.,

Defendant.

_____/

ORDER AFFIRMING MAGISTRATE'S REPORT AND RECOMMENDATION AND DENYING DEFENDANT'S MOTION TO DISMISS OR TO STAY, DENYING PLAINTIFF'S MOTION TO STAY, AND ORDER DENYING ALL PENDING MOTIONS

(Filed Sep 08 1994)

THIS CAUSE came before the Court upon Defendant's Motion to Dismiss or to Stay Proceedings (d.e. 5-1 and 5-2) and Plaintiff's Motion to Stay Arbitration (d.e. 10).

THE MATTER was referred to the Honorable Stephen T. Brown, United States Magistrate Judge. A Report and Recommendation filed July 20, 1994 recommends that both motions be denied. Defendant filed Objections to the Report.

THE COURT has conducted a *de novo* review of the entire record. Being otherwise fully informed in the premises, it is

ADJUDGED that United States Magistrate Judge Stephen T. Brown's Report and Recommendation is **AFFIRMED** in its entirety. Based on the report, the objections are **OVERRULED**, the Defendant's Motion to Dismiss or to Stay Proceedings (d.e. 5-1 and 5-2) is **DENIED**, and Plaintiff's Motion to Stay Arbitration (d.e. 10) is **DENIED AS MOOT.** Additionally, all other Motions pending as of August 15, 1994 are **DENIED AS MOOT.**

Finally, Defendant shall file an Answer to the Complaint no later than September 16, 1994.

DONE AND ORDERED in Chambers at Miami, Florida, this 26th day of August, 1994.

/s/ Federico A. Moreno
UNITED STATES
DISTRICT JUDGE
FEDERICO A. MORENO

Copies provided:

Stephen E. Nagin, Esq.
David Ross, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 94-779-CIV-MORENO

KOTAM ELECTRONICS, INC.,
d/b/a SOUND INFINITY CENTER,

Plaintiff,

vs.

JBL CONSUMER PRODUCTS, INC.,

Defendant.

_____/

REPORT AND RECOMMENDATION

THIS MATTER is before this Court on Defendant's Motion to Dismiss or, in the Alternative, to Stay Proceedings Pending Arbitration ("Motion to Dismiss"), and Plaintiff's Motion to Stay Arbitration Pending Resolution of the Motion to Dismiss ("Motion to Stay"), pursuant to an order of reference entered by the Honorable Federico A. Moreno, United States District Judge. This Court has reviewed the motions, responses, and replies, and all other matters pertinent to the resolution of this matter.

FACTS

Plaintiff Kotam Electronics, Inc. ("Kotam") is a dealer and distributor of consumer electronics products. Kotam brought this antitrust case alleging that Defendant JBL Consumer Products, Inc. ("JBL"), violated the Robinson-Patman Act (15 U.S.C. § 13) through price discrimination in JBL's sales of certain consumer electronics products to

Kotam and other dealers and distributors of JBL's products. The Dealer and Distributor Agreements which governed the relationships between JBL and Kotam included clauses requiring the parties to submit their disputes, including claims asserting violations of antitrust laws, to arbitration. Kotam does not deny that the claims at issue arose out of the Dealer and Distributor Agreements.

Despite the arbitration clause, Kotam filed the instant case with the court on April 21, 1994. Since the filing of the case, JBL commenced a proceeding to arbitrate the controversy through the American Arbitration Association. JBL then filed its Motion to Dismiss. Kotam filed its Motion to Stay on June 7, 1994. As the date for the commencement of arbitration approached, Kotam filed an Emergency Motion for Expedited Ruling on Motion for Stay. On June 28, 1994, this Court entered an Order that the arbitration in this case be stayed pending further order of this Court.

JBL argues that the arbitration clause in the Dealer and Distributor Agreements controls, and that the claims must, therefore, be submitted to arbitration. Kotam argues that binding precedent in the Eleventh Circuit precludes antitrust claims from being submitted to arbitration.

DISCUSSION

The Parties' extended analysis of the policy and reasoning behind their respective positions is irrelevant to this Court. The question before this Court is a narrow and simple one. This Court need not determine the proper policy, but must simply determine which precedent binds

the Court. Kotam relies upon *Cobb v. Lewis*, 488 F.2d 41 (5th Cir. 1974), which holds that antitrust claims are not subject to arbitration. JBL argues that recent developments in the law regarding arbitration have overruled *Cobb*, as demonstrated by a recent decision in this District, which held that antitrust claims are subject to arbitration.

I. Former Fifth Circuit Precedent

Upon its founding, the Eleventh United States Circuit Court of Appeals adopted all Fifth Circuit case law prior to October 1, 1981 as binding precedent, in *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981). In *Bonner*, the Eleventh Circuit also adopted the Fifth Circuit's rule that a precedent of the Circuit could only be overruled by the Circuit Court sitting *en banc*, or, obviously, by the United States Supreme Court. The new Eleventh Circuit Court recognized that it may not want to follow all Fifth Circuit decisions, but reasoned, "The Eleventh Circuit sitting en banc will be an available forum for pursuit of a better rule and for our rejection of any old Fifth Circuit precedents that we consider should be no longer followed." *Id.* at 1211. The principle that only the Supreme Court, or the Eleventh Circuit Court en banc can reverse binding Fifth Circuit decisions has been consistently reaffirmed by the Eleventh Circuit. *See, e.g., Leon v. Wainwright*, 734 F.2d 770, 772 (11th Cir. 1984); *Lewis v. Federal Prison Industries, Inc.*, 786 F.2d 1537 (11th Cir. 1986).

Clearly, the rule that "as a general matter, antitrust claims are not appropriate subjects of arbitration," as stated in *Cobb*, could only be overruled by the Eleventh

Circuit sitting en banc, or by the United States Supreme Court. 488 F.2d at 47. The Eleventh Circuit has issued no decision to that effect.

II. Supreme Court Treatment

The narrow question before this Court, then, is whether the Supreme Court overruled *Cobb* by its decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, ___ S.Ct. ___, ___ L.Ed. ___ (1985).

In *Mitsubishi*, the Court stated, "We granted certiorari primarily to consider whether an American court should enforce an agreement to resolve antitrust claims by arbitration when that agreement arises from an international transaction. 473 U.S. at 624, S.Ct. at ___. The Court recognized the doctrine that antitrust claims were considered not arbitrable, as stated in *American Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (1968).[1] While discussing this doctrine, the Court stated, "We find it unnecessary to assess the legitimacy of the *American Safety* doctrine as applied to agreements to arbitrate arising from domestic transactions." 473 U.S. at 629, S.Ct. at ___. The Court further stated, "We conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we

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[1] The Fifth Circuit decision in *Cobb v. Lewis*, 488 F.2d 41 (5th Cir. 1974), followed the rationale of *American Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968), and so a decision overruling *American Safety* would certainly overrule *Cobb*.

enforce the parties' agreement, *even assuming that a contrary result would be forthcoming in a domestic context." Id.* (emphasis added). Thus, the Court expressly disclaimed any effect on the precedents of the various Courts of Appeal following the *American Safety* doctrine, and highlighted the international rationale behind its holding, and again noted that the domestic result might be contrary.

The Court discussed its skepticism for the *American Safety* doctrine only while balancing the doctrine against the policy favoring arbitration. "Thus, we must weigh the concerns of *American Safety* against a strong belief in the efficacy of arbitral procedures for the resolution of international commercial disputes and an equal commitment to the enforcement of freely negotiated choice-of-forum clauses." 473 U.S. at 631, S.Ct. at ___. The Court clearly limited its rejection of the *American Safety* doctrine to the context of international commercial disputes.

A judge in this District issued a decision in *Western Intern. Media Corp. v. Johnson,* 754 F.Supp. 871 (S.D.Fla. 1991), in which he relied upon the Supreme Court's decision in *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.,* 473 U.S. 614, ___ S.Ct. ___, ___ L.Ed. ___ (1985), and held domestic antitrust claims subject to arbitration. 754 F.Supp. at 873.

As admitted in the *Johnson* opinion, "the [*Mitsubishi*] Court supported its rejection of some of the *American Safety* concerns on grounds tied to the principles involved in international commercial transactions," but he opined that the Court's recent decisions suggest that the result arrived at in *Mitsubishi* would be forthcoming in the domestic situation today. 754 F.Supp. at 873-4. It seems,

though, that one of the strengths of the "absolute rule" of precedent is that confusion and unpredictability are decreased by not predicting what may be decided by a given court, but instead relying upon what has been decided. Here, the Supreme Court expressly did not reach the issue of domestic commercial disputes.

It would also be incorrect to argue the decision in *Western Intern. Media Corp.* binds this court. District Courts are not bound by decisions of other district courts, or even opinions of other judges in the same district court. *Fox v. Acadia State Bank*, 937 F.2d 1566, 1570 (11th Cir. 1991).

Finally, *Hardwick v. Bowers*, 760 F.2d 1202 (11th Cir. 1985), suggests that the Supreme Court need not directly reverse an earlier decision, in order to allow lower courts to reach their own conclusions. "Doctrinal developments need not take the form of an outright reversal of the earlier case." *Id.* at 1209. The court seemed to restrict the breadth of lower courts, by explaining, "Even less clear-cut expressions by the Supreme Court can erode an earlier summary disposition because summary actions by the Court do not carry the full precedential weight of a decision announced in a written opinion after considering briefs and oral argument." *Id.* at 1209. In *Hardwick*, however, the court was discussing a case involving a summary disposition. In *Mitsubishi*, however, the Court expressly did not reach the question of arbitration of antitrust claims in domestic cases, and so it is improper for a lower court to treat the question as open.

RECOMMENDATION

Based on the foregoing, it is the recommendation of this Court that the Defendant's Motion to Dismiss or, in the Alternative, Stay Proceedings Pending Arbitration, be **DENIED**, and that Plaintiff's Motion to Stay Arbitration Pending Resolution of the Motion to Dismiss be **DENIED** as moot.

The parties have ten (10) days from the date of this Report and Recommendation within which to serve and file written objections, if any, with the Honorable Federico A. Moreno, United States District Judge for the Southern District of Florida. Failure to file objections timely shall bar the parties from attacking on appeal the factual findings contained herein. *LoConte v. Dugger*, 847 F.2d 745 (11th Cir. 1988), *cert. denied*, 488 U.S. 958, 109 S.Ct. 397 (1988).

DONE AND ORDERED this 19th day of July 1994 at Miami, Florida.

/s/ Stephen T. Brown
STEPHEN T. BROWN
U. S. MAGISTRATE JUDGE

cc: Honorable Federico A. Moreno
Carolyn A. Pickard, Esq.
David L. Ross, Esq.
Robert H. Rawson, Esq.

Supreme Court, U.S.
FILED
DEC 23 1996
CLERK

(2)

No. 96-800

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

KOTAM ELECTRONICS INC.,

Petitioner,

v.

JBL CONSUMER PRODUCTS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a negotiated agreement to arbitrate a domestic antitrust dispute is enforceable under the Federal Arbitration Act in the absence of evidence that Congress intended to preclude a waiver of judicial remedies for alleged antitrust violations.

PARTIES TO THE PROCEEDINGS

All parties in the courts below and here are listed in the caption. Respondent JBL Consumer Products, Inc. is a division of JBL Incorporated. JBL Incorporated is a subsidiary of Harman Investment Company, Inc., which in turn is a subsidiary of Harman International Industries, Inc. The following is a list of the affiliates of JBL Incorporated:

AKG Acoustics GmbH
AKG Acoustics India Ltd.
AKG Acoustics plc
AKG Akustische u. Kino-Geräte Gesellschaft m.b.H.
Allen & Heath Limited
Amek Systems and Controls Ltd.
Amek Technology Group Plc
Audax Industries SNC
Audax of America, Inc.
Bandive Limited
Becker Automotive (Pty) Ltd.
Becker GmbH
Becker Holding GmbH
Becker of North America, Inc.
Becker Service und Verwaltung GmbH
BSS Audio Ltd.
D.A.V.I.D. GmbH
Edge Technology Group Ltd.
Entel, Ltd.
Environmental Investments, Ltd.
Epicure Products, Inc.
Fosgate, Inc.
Gatehit Limited
Hall Effects Laboratories, Ltd
Harco Indiana, Inc.
Harman Audio Outlet, Inc.
Harman Belgium NV
Harman Consumer Europe A/S
Harman Consumer France SNC
Harman Consumer Manufacturing - El Paso, Inc.

Harman Consumer Nederland, B.V.
Harman Deutschland GmbH
Harman Enterprises, Inc.
Harman France SNC
Harman Holding Europe A/S
Harman Interactive, Inc.
Harman International Foreign Sales Corporation
Harman International Industries Limited
Harman International Japan Co., Limited
Harman International Singapore Pte. Ltd.
Harman-Kardon, Incorporated
Harman Marketing Europe A/S
Harman-Motive, Inc.
Harman Motive Limited
Harman Music Group, Incorporated
Harman Pro France SNC
Harman Pro North America, Inc.
Harman Residential Group, Inc.
Harman UK Limited
Infinity Systems A/S
Infinity Systems, Inc.
JBL Europe A/S
Lexicon, Incorporated
Lydig of Scandinavia A/S
Madrigal Audio Laboratories, Inc.
MBI Broadcast Systems Limited
Orban, Inc.
Precision Devices, Ltd
Revel Corp.
SCJ + AKG Ltd.
Sescord Limited
Son-Audax Loudspeakers Limited
Soundcraft Electronics Limited
Soundcraft Magnetics Limited
Spirit by Soundcraft, Inc.
Studer Deutschland GMBH
Studer Editech Corp.
Studer Canada Limited

Studer Japan Ltd.
Studer Professional Audio AG
Studer U.K. Limited
Studer Wien Ges.Mbh
Studer Digitec, S.A.
Total Audio Concepts Ltd.
TurboSound Ltd.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-800

KOTAM ELECTRONICS INC.,

Petitioner,

v.

JBL CONSUMER PRODUCTS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The petition for writ of certiorari should be denied because it asks the Court to consider an issue concerning which it has already provided sufficient guidance and as to which no split of authority exists among the circuit courts. Although decided on its own facts in the context of an international dispute, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), and its progeny make clear that, under the Federal Arbitration Act and the federal policy favoring arbitration embodied therein, agreements to arbitrate antitrust claims — including domestic claims — are enforceable. Every circuit court to consider the issue since *Mitsubishi* has reached that conclusion based on this Court's existing authority.

STATEMENT

From approximately 1984 to 1992, petitioner Kotam Electronics, Inc. ("Kotam"), a dealer and distributor of consumer electronic products, entered into annual dealer and distributor contracts with Respondent JBL Consumer Products, Inc. ("JBL"). Each contract contained an identical arbitration clause explicitly

requiring the parties to submit claims arising out of their contractual relationship, including claims asserting violations of the antitrust laws, to binding arbitration:

> 22. GOVERNING LAW AND ARBITRATION
>
> b. Any controversy or claim arising out of or relating to this Agreement, or the breach or validity thereof, whether at common law or under statute, *including without limitation claims asserting violation of the antitrust laws*, shall be settled by final and binding arbitration in accordance with the Rules for Commercial Arbitration of the American Arbitration Association ("AAA") in effect at the time of the execution of this Agreement.

Pet. 6 (emphasis added in petition). Despite its contractual promise to arbitrate such disputes, Kotam filed a one-count complaint against JBL on April 21, 1994, in the United States District Court for the Southern District of Florida, alleging price discrimination in violation of the Robinson-Patman Act, 15 U.S.C. § 13(a).[1]

On May 23, 1994, JBL moved to dismiss the complaint or, in the alternative, to stay judicial proceedings pending arbitration pursuant to Section 3 of the Federal Arbitration Act, 9 U.S.C. § 3. The District Court denied JBL's motion to dismiss on September 8, 1994, believing it was bound to apply the former Fifth Circuit's broad holding in *Cobb v. Lewis*, 488 F.2d 41, 47 (5th Cir. 1974), *overruled by Kotam Elec., Inc. v. JBL Prods., Inc.*, 93 F.3d 724 (11th Cir. 1996), that ". . . as a general matter, antitrust claims are not appropriate subjects of arbitration" despite intervening Supreme Court authority rejecting each of the premises for *Cobb*'s non-arbitration rule. A divided panel of the Eleventh Circuit affirmed the District Court's decision. On November 8, 1995, however, the Eleventh Circuit granted JBL's

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[1] There has never been any dispute that Kotam's single claim for price discrimination falls squarely within the terms of the parties' agreement to arbitrate "claims asserting violation of the antitrust laws."

request for a rehearing *en banc*, thereby vacating the panel's decision. 69 F.3d 1097.

On August 19, 1996, the Eleventh Circuit sitting *en banc* held that Supreme Court precedent developed since *Cobb* and beginning with *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, compels the conclusion that ". . . arbitration agreements concerning domestic antitrust claims are enforceable." *Kotam Elec. Inc. v. JBL Consumer Products, Inc.*, 93 F.3d 724, 728 (11th Cir. 1996) (*en banc*) (reprinted at Pet. App. 1-11). As the full court recognized, the *Cobb* panel had expressly followed the reasoning of the Second Circuit in *American Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 827-28 (2d. Cir. 1968), to support its view that, as a matter of public policy, antitrust claims should not be submitted to arbitration (the "*American Safety* doctrine"). As the Eleventh Circuit observed, in *Mitsubishi* this Court rejected each element of the *American Safety* doctrine upon which *Cobb* was based, thereby undercutting the argument that the rule against arbitration of domestic antitrust claims remains viable. Pet. App. 5-8.

First, in *Mitsubishi* the Supreme Court rejected the contention that antitrust claims must be resolved in the courts to preserve the role of private litigants in aiding the enforcement of the antitrust laws. 473 U.S. at 635-37. Second, this Court concluded that "[t]he mere appearance of an antitrust dispute does not alone warrant invalidation of the selected forum on the undemonstrated assumption that the arbitration clause is tainted." *Id.* at 632. Third, this Court rejected the notion that the issues and evidence in antitrust cases are better suited to judicial procedures. *Id.* at 633. Finally, this Court ". . . decline[d] to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators." *Id.* at 634.

Acknowledging that *Mitsubishi* involved the enforcement of an agreement to arbitrate an antitrust dispute in the international context, the Eleventh Circuit nevertheless concluded that its rationale compels enforcement of agreements to arbitrate domestic

antitrust claims as well. Pet. App. 8-9. Since the Supreme Court rejected each of the premises of the judicially-created rule against arbitration of antitrust claims, the Eleventh Circuit held, no basis remains for refusing to enforce bargains to arbitrate domestic antitrust claims. Pet. App. 7-10. In light of the "federal policy favoring arbitration" embodied in the Federal Arbitration Act, a party, having agreed to arbitrate, should be held to that bargain unless Congress itself has ". . . evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." Pet. App. 8 (quoting *Mitsubishi*, 473 U.S. at 628, 105 S.Ct. at 3354-55). The Supreme Court in *Mitsubishi* could find no such evidence in the legislative history of either the Sherman Act or the Federal Arbitration Act. Pet. App. 7-8. (citing *Mitsubishi*, 473 U.S. at 628-29). Thus, the Eleventh Circuit held, *Mitsubishi* applies equally in the domestic arena.

The Eleventh Circuit also relied on the fact that the Supreme Court itself has repeatedly abandoned the *American Safety* doctrine in the domestic context. Pet. App. 8-10. Indeed, in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), the Court rejected a Second Circuit opinion that its *American Safety* doctrine was still good law despite *Mitsubishi*, and in part on that basis discarded the distinction between domestic and international transactions with respect to arbitration of claims under § 10(b) of the Securities Exchange Act of 1934 and RICO. *See also id.*, 482 U.S. at 232 (declining to limit *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), involving the arbitrability of § 10(b) claims, to cases involving international transactions). This Court has also cited *Mitsubishi* for the general proposition that antitrust claims are arbitrable, making no distinction between those that arise from international transactions and those that arise in the domestic context. *Gilmer v. Interstate/ Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

Finally, the Eleventh Circuit relied on the fact that, as discussed more fully below, four other circuits have decided or expressed the view that, in light of *Mitsubishi* and its progeny, domestic antitrust claims are arbitrable. Pet. App. 10-11 (citing *Sanjuan v. American Bd. of Psychiatry and Neurology, Inc.*, 40

F.3d 247, 250 (7th Cir. 1994), *cert. denied*, 116 S.Ct. 1044 (1996); *Nghiem v. NEC Elec., Inc.*, 25 F.3d 1437, 1441-42 (9th Cir.), *cert. denied*, 115 S.Ct. 638 (1994); *Hough v. Merrill Lynch*, 946 F.2d 883 (2d Cir. 1991) (affirming without op., 757 F.Supp. 283, 286 (S.D.N.Y. 1991)); *Smoky Greenhaw Cotton Co., Inc. v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 785 F.2d 1274, 1282 (5th Cir. 1986) (*per curiam*), *cert. denied*, 482 U.S. 928 (1987)).

REASONS FOR DENYING THE WRIT

The Court need not revisit the arbitrability of domestic antitrust claims. As the Eleventh Circuit held below, existing Supreme Court authority already provides sufficient guidance to conclude that agreements to arbitrate domestic antitrust claims are enforceable under the Federal Arbitration Act. Indeed, since *Mitsubishi* was decided, every circuit to consider the issue has reached this conclusion.

Beginning even before *Mitsubishi*, the Supreme Court has consistently recognized a "'liberal federal policy favoring arbitration agreements.'" *Mitsubishi*, 473 U.S. at 625 (quoting *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983). This policy is embodied in the Federal Arbitration Act, which was "designed to overcome an anachronistic judicial hostility to agreements to arbitrate." *Id.* at 625 n.14 (citing *Dean Witter Reynolds Inc. v Byrd*, 470 U.S. 213, 219-221 and n.6 (1985); *Scherk v. Alberto-Culver Co.*, 417 U.S. at 510 & n.4). Congress' "'preeminent concern [in passing the Act] was to enforce private agreements into which parties had entered,' a concern which 'requires that [courts] rigorously enforce agreements to arbitrate.'" *Mitsubishi*, 473 U.S. at 625-26 (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. at 221). In view of that concern, ". . . any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Id.* at 626 (quoting *Moses H. Cone*, 460 U.S. at 24-25).

Notwithstanding Kotam's arguments to the contrary, *Mitsubishi* and its progeny make clear that the federal policy favoring

enforcement of arbitration agreements applies to domestic (as well as international) antitrust claims. The core holding in *Mitsubishi* (though the case arose in an international context) is that, because Congress has evinced no intention to the contrary, the Federal Arbitration Act authorizes enforcement of agreements to arbitrate claims under the antitrust statutes, 473 U.S. at 628, 632-37, a holding that applies equally to domestic disputes.

As explained in *Mitsubishi*, the "centerpiece provision" of the Arbitration Act "makes a written agreement to arbitrate 'in any . . . contract evidencing a transaction involving commerce . . . valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'" 473 U.S. at 625 (quoting 9 U.S.C. § 2). In view of this Congressional mandate, the Supreme Court has already held that federal statutory claims are *presumptively* arbitrable ". . . unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Id.* at 628.[2]

Thus, the party resisting enforcement of an arbitration agreement bears the burden of demonstrating that Congress intended to exempt the particular statutory rights at issue from arbitration. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. at 26 (citing *Shearson/American Express Inc. v. McMahon*, 482 U.S. at 227; *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). This intent may only be gleaned from the text of the statute at issue, from its legislative history, or from an "inherent conflict" between the purposes of the statute and arbitration. *Gilmer*, 500 U.S. at 26 (citing *McMahon*, 482 U.S. at 227; *Mitsubishi*, 473 U.S. at 628).

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[2] *See also Mitsubishi*, 473 U.S. at 627 ("Just as it is the congressional policy manifested in the Federal Arbitration Act that requires courts liberally to construe the scope of arbitration agreements covered by that Act, it is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable.").

In *Mitsubishi* the Court examined both the Sherman and Federal Arbitration Acts and their legislative histories, but found no evidence that Congress intended to preclude arbitration of antitrust claims, domestic or otherwise. 473 U.S. at 628-29, 635-36. The Court found, moreover, no "inherent conflict" between the antitrust laws and arbitration. Instead, it identified and considered each of the relevant policy considerations (effectively addressing each of the concerns raised by Kotam at pages 18-19 of the Petition), but concluded that these considerations provide no basis for exempting claims under the antitrust statutes. *Id.* at 632-37. This analysis leaves no room for debate about the "wisdom" of enforcing agreements to arbitrate claims under the antitrust laws. *See Nghiem v. NEC Elec., Inc.*, 25 F.3d at 1441-42; *accord* Pet. App. 6-8.

Petitioner Kotam, nevertheless, argues that the Court should grant its petition to reconsider whether domestic antitrust claims ought to be submitted to arbitration, simply reiterating policy concerns already rejected in *Mitsubishi*. Principally, it argues that the Court should consider whether enforcing agreements to arbitrate antitrust disputes would undermine the role of private litigants in enforcing the antitrust statutes. Pet. 18-19. The Court, however, has already rejected that argument, concluding:

> [S]o long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.

Mitsubishi, 473 U.S. at 637.[3] The Court reasoned that, despite

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[3] *See also Gilmer*, 500 U.S. at 27-28 (citation omitted):

> It is true that arbitration focuses on specific disputes between the parties involved. The same can be said, however, of judicial resolution of claims. Both of these dispute resolution mechanisms nevertheless also can further broader social purposes. The Sherman Act, the Securities Exchange Act of 1934, RICO, and the Securities Act of 1933 all are designed to advance important public policies, but, as noted above, claims under these statutes are appropriate for

the "important incidental policing function" of the treble-damages cause of action, Congress' primary purpose was to provide a remedy, in a proper case, to an injured competitor.[4] *Id.* at 635-37. *See also McMahon*, 482 U.S. at 240. It went on to find, moreover, no basis for assuming that arbitration will be an inadequate mechanism for enforcement of the antitrust laws, since arbitrators are bound, as are judges, to apply the antitrust laws. *Mitsubishi*, 473 U.S. at 636-37. Notwithstanding Kotam's arguments to the contrary, the Supreme Court has already found no conflict between the use of arbitration and the broader social purposes of the antitrust statutes.

Petitioner Kotam also argues that the Court should consider whether arbitration procedures are ill-suited for the resolution of antitrust claims, speculating that parties to antitrust arbitration will have inadequate discovery and will be prejudiced if arbitrators do not produce written opinions. Pet. 19. In *Mitsubishi*, however, the Court rejected the premise that aspects of the arbitral process including "'. . . expedition, minimal requirements of written rationale, simplicity, [and] resort to basic concepts of common sense and simple equity'" are ill-adapted to potentially complex antitrust cases. *Mitsubishi*, 473 U.S. at 632, 634-35 (quoting *American Safety*, 391 F.2d at 826). As the Court observed, ". . . it is often a judgment that streamlined proceedings and expeditious results will best serve their needs that causes parties to agree to arbitrate their disputes." *Id.* at 633.

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arbitration.

[4] The same rationale applies whether a party is seeking injunctive relief, damages, or both. *See* Pet. at 18-19. This is not, in any event, a case in which the arbitrator may be asked to impose injunctive relief since Kotam is no longer a distributor or dealer of JBL products and cannot be affected in any way by JBL's future pricing practices. *See, e.g. Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1452 (11th Cir. 1991) ("[A] plaintiff, in order to have standing under section 16 [to pursue injunctive relief], must allege threatened injury that would constitute antitrust injury if inflicted upon the plaintiff.").

Kotam further asserts a need for the Court to consider whether antitrust issues should be kept from commercial arbitrators because of the relatively limited opportunity for review of "erroneous award[s]." Pet. 18. The Court in *Mitsubishi*, however, ". . . decline[d] to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators." 473 U.S. at 634. As the Court later observed in *McMahon*, it expressed this confidence in arbitral tribunals even assuming the absence of judicial oversight:

> In *Mitsubishi*, for example, we recognized that arbitral tribunals are readily capable of handling the factual and legal complexities of antitrust claims, notwithstanding the absence of judicial instruction and supervision. See 473 U.S., at 633-34.

McMahon, 482 U.S. at 232.

Kotam finally argues that Supreme Court review is necessary to determine whether arbitration of antitrust claims should be precluded because of the speculative danger that manufacturers may impose "unfair" arbitration provisions on what Kotam casually assumes to be relatively weak distributors. Pet. 19. In so doing, Kotam attempts to resuscitate yet another concern that *Mitsubishi* addressed: "The mere appearance of an antitrust dispute does not alone warrant invalidation of the selected forum on the undemonstrated assumption that the arbitration award is tainted." *Mitsubishi*, 473 U.S. at 632. Under *Mitsubishi*, in a proper case, a party may avoid an "unfair" arbitration provision by presenting a ". . . well-supported claim[ ] that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract.'" Id. at 627.

Petitioner Kotam is simply incorrect when it claims that "[t]here is real conflict and confusion among various circuits regarding the scope and effect of *Mitsubishi*." Pet. 20. The cases Kotam cites as conflicting with the Eleventh Circuit's *en banc* opinion say nothing about the scope and effect of *Mitsubishi* because each pre-dates the *Mitsubishi* decision. Indeed, as the

court below recognized, every Circuit that has addressed the issue since *Mitsubishi* has concluded that the rule against arbitration of domestic antitrust disputes is incompatible with *Mitsubishi* and its progeny and that domestic antitrust claims are therefore arbitrable.

In *Nghiem v. NEC Electronic, Inc.*, the Ninth Circuit overruled its own otherwise controlling authority to the contrary and held that under *Mitsubishi* and its progeny, domestic antitrust claims may be submitted to arbitration. Like the Eleventh Circuit in this case, it was ". . . persuaded that *Mitsubishi* is not restricted to the international context":

> Given the Court's meticulous step-by-step disembowelment of the *American Safety* doctrine, this circuit will no longer follow *American Safety*. We hold that *Mitsubishi* effectively overruled *American Safety* and its progeny.

Nghiem, 25 F.3d 1441-42. It also relied, as did the Eleventh Circuit, on the fact that the Supreme Court has cited *Mitsubishi* for the general proposition that antitrust claims can be submitted to arbitration. *Id.* at 1441 (citing *Gilmer*, 500 U.S. at 26-27). Finally, it, like the Eleventh Circuit, relied on the "'the reasoning used by the [Supreme] Court in *McMahon* to support its holding regarding the arbitrability of 1934 Act and RICO claims'":

> "The *McMahon* Court made no distinction between the international and domestic arbitral forums, but rather stated that domestic and international arbitrators are equally able to handle complex statutory schemes involving treble damage remedies. Such reasoning, in combination with the FAA *can only mean* the judicially implied *antitrust exemption to the FAA no longer exists*."

Id. (quoting G. Richard Shell, *Res Judicata and Collateral Estoppel Effects of Commercial Arbitration*, 35 UCLA L. Rev. 623, 624 n.7 (1988)).[5]

The Second Circuit itself has disavowed its prior decision in *American Safety*, affirming a district court's holding that ". . . the reasoning of *Mitsubishi* should apply with equal force to domestic claims" and that "'. . . none of the justifications for the *American Safety* doctrine retain their vigor.'" *Hough v. Merrill Lynch*, 757 F.Supp. 283, 286 (S.D.N.Y.), *aff'd without op.*, 946 F.2d 883 (2d Cir. 1991) (citations omitted). More recently, it cited *Mitsubishi* for the proposition that "[t]he policy in favor of arbitration extends . . . to . . . arbitrations of claims based on federal statutory rights [including antitrust claims]," drawing no distinction between international and domestic disputes. *National Union Fire Ins. Co. v. Belco Petroleum Corp.*, 88 F.3d 129, 133 (2d Cir. 1996). *See also United States Fire Ins. Co. v. National Gypsum Co.*, No. 95-7806 1996 U.S. App. LEXIS 29159 at * 7 (2d Cir. Nov. 4, 1996) (citing *Mitsubishi* for the general proposition that "antitrust claims are arbitrable").

Likewise, the Seventh Circuit stated in dicta that companies ". . . may agree to arbitrate their antitrust disputes — certainly so for international transactions, . . . and likely so for domestic transactions." *Sanjuan v. American Bd. of Psychiatry and Neurology, Inc.*, 40 F.3d at 250. The Fifth Circuit stated in a non-antitrust case that ". . . although *Mitsubishi* arose in an international antitrust dispute and its holding purports to be limited to that context, we believe that its broad language may

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[5] In light of this analysis and the careful opinion of the Eleventh Circuit below, there is no merit to Kotam's assertion that the Ninth and Eleventh Circuits simply "jumped to the conclusion that the policies underlying domestic and international antitrust disputes are indistinguishable." Pet. 20. Both the Eleventh and Ninth Circuits examined existing Supreme Court authority and concluded that this Court has already rejected each of the policy arguments against permitting arbitration of domestic antitrust disputes.

carry significance for domestic disputes as well." *Smoky Greenhaw Cotton Co., Inc. v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 785 F.2d at 1282. In short, no confusion, let alone conflict, exists among the circuits concerning the implications of *Mitsubishi* and its progeny.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1996

KOTAM ELECTRONICS, INC.,

Petitioner,

v.

JBL CONSUMER PRODUCTS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Respondent's disingenuous discussion of *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), as well as its omission of any response to arguments raised either in the Petition or by the United States Department of Justice in its *amicus curiae* brief submitted to the Eleventh Circuit (*en banc*), necessitates this Reply.

The Eleventh Circuit decision (*en banc*), 93 F.3d 724 (1996) – which extends *Mitsubishi* to domestic antitrust cases – fails to distinguish between the *limited* effect of an absence of discovery and appellate review in the international context, and the *pronounced* effect of those missing components in the domestic context. The domestic legal arena is devoid of the overriding, countervailing considerations that supported this Court's explicit weighting of factors in the international context of *Mitsubishi*. Respondent simply ignores these significantly distinguishing features. Consequently, the reasoning in respondent's brief makes no sense for the domestic economy.

In international arbitration of antitrust matters, characterized by the lack of a written opinion with findings of fact and conclusions of law, and the absence of meaningful appellate review, the principle of *stare decisis* simply is not a concern. Consequently, where arbitral awards will not affect domestic antitrust enforcement it is appropriate to accommodate arbitration for antitrust disputes in an international context. This political and legal concession to international considerations (e.g., "concerns of international comity, respect for the capacities of foreign and

transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes," *Mitsubishi*, at 629) outweighs the possibility that idiosyncratic arbitral awards might be at odds with U.S. law.

Thus it is understood that, for U.S. businesses choosing to conduct international commerce, an arbitral dispute resolution forum will be honored, and not set aside by a U.S. court, devoid though that forum might be of normative features and protections set forth in the Federal Rules of Civil Procedure, Federal Rules of Evidence, and Federal Rules of Appellate Procedure. *Mitsubishi* establishes this proposition, and to read the case as anything other than an insightful recognition of the limitation of U.S. law, through a careful balance of international comity considerations, would render much of the basic reasoning of the decision superfluous and irrelevant.

Respondent, a major company that insisted on the arbitration clause at issue, apparently is unconcerned about the deleterious effects of expanding *Mitsubishi's* holding to the domestic context. However, the writ of certiorari should be issued because the very points that respondent chooses to ignore in its Opposition are central to domestic enforcement of antitrust law, as stressed by the United States.

Respondent conspicuously avoids even discussing the potential for a durable, deleterious effect caused by forestalling meritorious private (or governmental) suits and retarding development of legal precedent. The United States, in its *en banc* brief as *amicus curiae* in the

Eleventh Circuit, pointed out that routine use of arbitration clauses in an industry or by a single entity with market power may escape public notice, thereby forestalling meritorious suits and on-going development of legal precedent (U.S. *amicus* brief, below, at 16). Respondent ignores this concern because the *en banc* decision below cannot sustain scrutiny on this issue.

Consideration of just one of many possible hypothetical examples might assist the Court. Assume that "A" and "B" agree to arbitrate any disputes – including *intentional* torts, such as antitrust claims – although unbeknownst to "A" it has overpaid for goods purchased from "B" because "B," "C," and "D" are engaged in a price-fixing conspiracy. If "A" subsequently proceeds against "B," enforcement of the arbitral provision would deprive "A" of third party discovery essential to prevailing in its antitrust claim. Similarly, if the party imposing the arbitration clause in a contract of adhesion possesses market power such that the second party has no practical choice but to sign the contract as is, then presumably an antitrust dispute would be forced into arbitration unless the second party could show at the outset, that its adversary possessed market power in a relevant market sufficient to force adhesion to the contract in the first place – i.e., full scale, rule-of-reason proof would be required just to avoid an unjust requirement to arbitrate the dispute.

The limitations on discovery typical of arbitration proceedings are "unsuited" to many types of antitrust claims (U. S. *amicus* brief, below, at 17), inasmuch as proof of market power often is critical in such cases. This especially is a threshold factor if a supposedly "negotiated" agreement to arbitrate a domestic antitrust dispute

is challenged on the basis that effective "negotiation" never occurred due to that very existence of market power (which is exactly what was claimed below in the case at bar). The absence of discovery from third parties necessary to establish the circumstances which give rise to the exercise of overwhelming economic power effectively would deny availability of proof required both to escape the arbitration clause and to win the dispute, itself. Once again, respondent simply ignores this issue.

The potential for costly and inefficient concurrent arbitration and litigation, as well as "the possibility of inconsistent results" (U. S. *amicus* brief, below, at 18), also augur against extending *Mitsubishi* to the domestic context. Yet Respondent ignores these dangers, as well.

The reporter systems are replete with cases in which district and circuit courts are reversed because judges made mistakes (just as the Eleventh Circuit has in this instance). Antitrust is a complicated area of law, yet it is so important to consumer welfare that such judicial errors must be corrected. When federal trial and appellate judges, chosen by the President and confirmed by the Senate, make mistakes (as they do) that can affect the fabric of our economy, their written decisions may be corrected by higher authority. Arbitrators, whose backgrounds receive considerably less scrutiny, are no less likely to make mistakes than carefully appointed federal judges. However, because arbitral review is limited only to clearly irrational or arbitrary errors of law or interpretation (9 U.S.C. 10, 11; *Ainsworth v. Skurnick*, 960 F.2d 939, 941 (11th Cir. 1992), *cert. denied*, 507 U.S. 915 (1993)), the absence of judicial review (discussed in the U.S. *amicus* brief, below, at 18-19) is an even more powerful

basis to reject arbitration of domestic antitrust claims. Respondent also ignores this significant concern.

Respondent evidently does not share the United States' concern over the "absence of federal oversight" (U.S. *amicus* brief, below, at 19), and ignores the fact that this Court's decisions subsequent to *Mitsubishi*, which address arbitrability of other statutes, are distinguishable because the Court "had no cause to rule on the considerations specific to arbitrability of domestic antitrust disputes" (U.S. *amicus* brief, below, at 20).

Lastly, the reasons to preclude arbitration of domestic antitrust disputes – one decade after *Mitsubishi*, over two decades after *Cobb v. Lewis*, 488 F.2d 41 (5th Cir. 1974), and almost three decades after *American Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (2nd Cir. 1968) – remain sound, even though this Court never has had occasion to consider those reasons. Perhaps this is why respondent distorts and overstates the decision in *Mitsubishi*, ignores the United States Department of Justice's concerns, avoids many of Petitioner's concerns, ignores the effect of its position on the jurisprudence of antitrust, and disingenuously treats the arbitrability of domestic antitrust claims as though this Court already has decided the issue.

When *American Safety* was decided in 1968, the application of economic reasoning to antitrust cases still was in its infancy. The level of reasoning by the Court has continued to evolve – from the Court's overruling of *United States v. Arnold Schwinn & Co.*, 388 U.S. 365 (1967), in *Continental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), to the Court's limitation of *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), in *Eastman*

Kodak Co. v. Image Technical Servs., Inc. 504 U.S. 451 (1992). When *Cobb* was decided, half a dozen years after *American Safety*, the Fifth Circuit did not consider more sophisticated rationale for the same reason that the *American Safety* court did not do so, and also, because it simply relied on the rationales expressed in *American Safety*. Consequently, for Respondent to suggest that this Court need not "consider an issue concerning which it has already provided sufficient guidance" – when the Court has *not* previously decided the issue, and the circuits that did so (and by virtue of which an inter-circuit conflict exists) did not have the benefit of many arguments never raised in the seminal cases of *American Safety* and *Cobb* – simply begs the issue.

CONCLUSION

For the foregoing reasons, respondent's opposition misses the mark, and the petition for a writ of certiorari should be granted.

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